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March 13, 2008

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Appeal of Enforcement Order

TDEC-OGC

20<sup>th</sup> Floor L&C Tower

401 Church Street

Nashville, TN 37243-1548

**RECEIVED**  
MAR 13 2008

DEPT OF ENVIRONMENT AND CONSERVATION  
OFFICE OF GENERAL COUNSEL

Re: Jim Smythe, Respondent  
Division of Water Pollution Control  
Case Number: WPC08-0031  
Respondent's Request for Review and Appeal of Order and Assessment

Gentlemen:

WHEREAS, on February 11, 2008 Respondent received a Director's Order and Assessment and further,

WHEREAS, Respondent requests a review of the Order and Assessment, the Respondent does hereby submit this Request for Review.

1. The Respondent, Jim Smythe, is a citizen and resident of Murfreesboro, Rutherford County, Tennessee. He is the owner of certain property as noted at Paragraph 2 of the Petition.

2. Paragraph 6 of the Complaint provides that a person is required to submit an application prior to engaging in any activity that requires an aquatic resource alteration permit. It would be respectfully submitted that the Respondent did not engage in the activity as set forth in the Petition. His status would be as owner of the property. The activity was conducted by a third party equipment operator. There would have been no direction to violate any regulation of the State of Tennessee or of the United States Government or to engage in any activity that required an aquatic resource alteration permit.

Appeal of Enforcement Order  
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3. Any direction provided as owner to the contractor was to not disturb the surface of the land but rather to make the property accessible to surveyors for purposes of preparation of a site plan.

4. The "unnamed tributary to West Fork Stones River" is not shown on maps as located on the property. Instead, it is located some 200 feet away from where same was apparently encountered by the contractor.

5. Prior to the National Environmental Field Office investigation of the Complaint on December 20, 2007, the owner of the property, the Respondent, had become aware that the contractor may have inadvertently caused some activity along what was believed to be a ditch as opposed to the unnamed tributary - which was again noted as being some 200 feet away. In any event, upon becoming aware, the owner stopped all activities upon the property significantly before December 20, 2007.

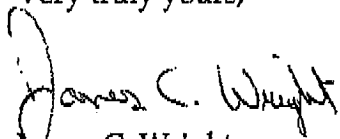
6. Also, in the interim and prior to December 20, 2007 the owner was notified by the City of Murfreesboro to stop activity in general upon the property, which in fact had stopped. Therefore, as of the date that the Division personnel for the Nashville Environmental field Office came to the property, the owner had already stopped and the City of Murfreesboro had instructed the owner to stop any and all activities generally upon the property. Therefore, the owner had no further activities of any type conducted.

7. The owner has submitted and set forth his position by way of a letter dated February 20, 2008, which is attached hereto and adopted herein.

8. The owner is cooperating with the field office as to the issues raised. However, due to time constraints as to the necessity of filing an appeal, this appeal is hereby filed.

Respectfully submitted this 13<sup>th</sup> day of March, 2008.

Very truly yours,

  
James C. Wright by permission Don B. J.

JCW/pad  
454-15616D/2

Attachment

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February 20, 2008

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State of Tennessee  
Department of Environment and Conservation  
Division of Water Pollution Control  
401 Church Street  
L&C Annex 6<sup>th</sup> Floor  
Nashville, TN 37243-1534

Re: Director's Order and Assessment  
Case No. WPC08-0031

Dear Mr. Jordan:

This letter is pursuant to our phone discussion of February 19, 2008. As we discussed, Mr. Smythe is an owner of the property in question. A third party contractor and not Mr. Smythe performed certain work upon the property. The contractor was to perform work in order for Mr. Smythe to have the property surveyed and assessed for purposes of a site plan. There was no intention or direction by Mr. Smythe to disturb any creek or waterway of the State of Tennessee. Again, instead, the work efforts were to simply clear sufficiently for surveyors and engineers to be able to access the property and to assess the conditions and locations upon the property for purposes of survey and site plan.

In this regard, in looking at maps of the property, some do not indicate the ditch or "unnamed tributary" at all. Others locate it as a dotted line some 200 feet away from where it was encountered by the third-party contractor upon the property. In this regard, it was believed to simply be a ditch as opposed to the "unnamed tributary" which was supposed to be some 200 feet away.

Furthermore, as we discussed in regard to the clearing for purposes of the survey and site assessment, it was believed that the relatively flat topography of the land was such that there should not be any runoff. Simply put, as a lay person Mr. Smythe did not believe that any violation was being conducted of any law of the State of Tennessee or otherwise and believed the actions of the contractor to be appropriate.

Also as we discussed and significantly, ten days prior to the review of the property by your investigator, all work had stopped upon the property until further assessment could be done. We will assure you that again no work has been conducted since ten days prior to the site assessment.

Mark A. Jordan  
February 20, 2008  
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In this regard, we would request consideration of a waiver of any fines or penalties.

Beyond this, I would note that the Order requires certain actions. Mr. Smythe has retained Bill Huddleston to perform this work and to oversee same. I believe that you already have Mr. Huddleston's contact information. In this regard, the Order sets forth the following as action steps:

**1. The Respondent shall, within seven days of receipt of the Order and Assessment, establish effective EPSC measures such that sediment is not allowed to leave the site or enter waters of the State.**

It is anticipated that silt fences will be established within the seven day period of the receipt of the Order. Again, assurance is made that no activity has occurred on the property or will occur on the property until the establishment of said silt fences and seeding and strawing. Because of the topography of the land, it is not likely that runoff or any significant runoff would occur or has occurred. Out of an abundance of caution, however, Respondent would request an additional three days in order to make sure as to compliance and coordination of compliance with Mark Jordan or other such representative of the State as to the measures implemented in Item 1.

**2. The Respondent shall, within seven days of establishing effective EPSC measures, submit written documentation and photographic evidence indicating that these measures are in place.**

It is anticipated that in any event this timetable should be met. However, again, in order to make sure as to compliance and coordination with staff, we would again request an additional seven days as to this time period.

**3. The Respondent shall maintain EPSC measures until such time as all land disturbance activities at the site are complete and erosion preventative permanent cover is established.**

As noted above, no land clearing activities will occur on the property until appropriate approvals are established in cooperation with the State offices.

**4. The Respondent shall, within fourteen days of receipt of this Order and Assessment, submit an NOI, SWPPP, site map and appropriate fee to the Division in order to obtain coverage under the TNCGP for construction activities at the site.**

It is believed by the Respondent that he should be able to comply with this time period. However, again, in order to make sure as to coordination with the Division, an additional seven day time period would be requested.

**5. The Respondent shall, within thirty days of receipt of this Order and Assessment, submit a corrective action plan (CAP), detailing the proposed measures to be taken to restore the**

Mark A. Jordan  
February 20, 2008  
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unnamed tributary in conformance with the January 2, 2008, NOV . . . The Respondent shall correct any deficiencies the Division finds and submit a corrected CAP within thirty days of notification of any deficiencies.

Respondent will act in good faith to comply with the thirty day time period set forth in Paragraph 5. Respondent would request the opportunity to seek an extension of this time period should it appear necessary as the CAP is developed.

6. The Respondent shall, within thirty days of receiving approval from the Division, initiate the actions contained in the approved CAP and submit documentation of the date these activities are initiated.

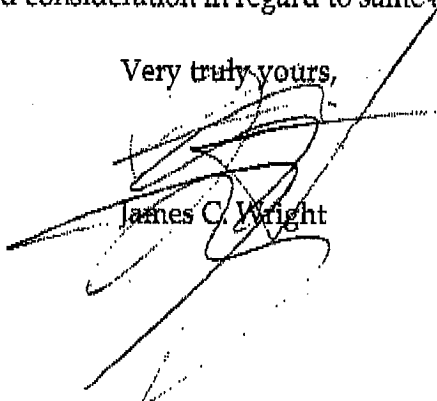
Again, Respondent would respectfully request that upon assessment of the activities if in good faith additional time period is needed, same be granted. Respondent intends to cooperate in good faith toward the deadline established.

7. The Respondent shall, within 120 days of approval, complete the actions contained in the CAP and submit documentation of completion to the Division at the respective address shown in Item 3.

Again, as with Items 6 and 7, Respondent intends in good faith to cooperate and comply with these time limits. Should it appear that additional time is needed in good faith, Respondent would respectfully request that the Division consider same and grant such additional time.

8. Paragraphs 8 and 9 deal with civil penalties. Respondent would respectfully request that the civil penalties be waived in regard to this matter in light of the aforestated reason and would request your advice in regard to same and consideration in regard to same at your earliest convenience.

Very truly yours,



James C. Wright

JCW/pad  
454-02/20

cc: Paul E. Davis